SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-894

LESTER RYAN,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE INDIANA SUPREME COURT

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TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner asks this Court to issue a Writ Of Certiorari to review the decision of the Indiana Supreme Court rendered October 31, 1974 with a written Order stating simply that the decision of the Indiana Court of Appeals would be upheld in that the Petitioner's Petition To Transfer was being denied. The written decision of the Indiana Court of Appeals was rendered July 9, 1974 and it has not yet been

published. A copy of that decision is "Appendix A" hereto. A timely Petition To Transfer is made "Exhibit B" hereto. The Rules Of Appellate Procedure in Indiana do not provide for a Petition For Rehearing in the Indiana Supreme Court where a Petition To Transfer from the Indiana Court of Appeals has been denied. It is believed that jurisdiction is conferred on this Court by Title 28, United States Code, Section 1257 (3).

QUESTION PRESENTED

WHETHER OR NOT IT CONSTITUTES A DENIAL OF DUE PROCESS TO INCREASE A PRISON TERM ALREADY IMPOSED WHEN THE ACCUSED UNDERTAKES THE FIRST STEP OF AN APPEAL.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT 5

No Person shall be held to answer for a capital, or otherwise infamous crime, unless of a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 8

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

AMENDMENT 14, SEC. 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

HOW THE ISSUE AROSE IN THE LOWER COURTS

Petitioner was convicted in a state trial Court in Lawrence County, Indiana of Assault and Battery, and sentenced to serve a period of 60 separate three-day intervals (weekends). The Indiana statute involved in the conviction provides for a maximum sentence of One Hundred Eighty days and Indiana's sentencing statutes provide that there shall be no sentences to begin in the future in the absence of specific statutory authority. No such provision exists with respect to the Assault and Battery statute. Petitioner filed a Motion To Correct Error in the Lawrence County Court to initiate his

Appeal, the contention being that his sentence was illegal under Indiana law. (This contention never was resolved but, of course, is not an issue in this Federal Petition.) The Trial Judge, upon thus being notified of the Petitioner's intent to Appeal, changed Petitioner's sentence to One Hundred and Eighty consecutive days. Petitioner then appealed to the Indiana Court of Appeals and the Indiana Supreme Court making the same federal contention that he is making here.

HOW THE ISSUE WAS PRESERVED

Petitioner's appeal resulted in the decision of the Indiana Court of Appeals which is "Appendix A" herein and that decision was the subject of the "Petition To Transfer" to the Indiana Supreme Court which is the subject of "Appendix B" herein. No Petition For Rehearing from a denial of a "Petition To Transfer" is provided for or permitted under Indiana law and the Indiana Supreme Court's denial of the said Petition to Transfer exhausted Petitioner's state remedies.

REASON WHY WRIT SHOULD BE GRANTED

PRINCIPLES RELIED ON HEREIN:

The principle case upon which Petitioner relies upon is *Pearce vs. North Carolina*, 395 U.S. 311, 89 Supreme Court 2072, 23 Lawyer Addition 2nd. 656 (1969). This of course is not a holding precedent but a guiding one, the said guiding precedent appearing at the outset of the Pearce decision, and reading as follows:

> "When at the behest of the Defendant a criminal conviction has been set aside . . . to what extent does the Constitution limin [sic] the imposition of a harsher sentence . . . ?

The Petitioner in this cause received a decisively harsher sentence after announcing his intentions to Appeal, by his filing of a Motion To Correct Error. Such a practice by any accord obviously would have the effect of causing potential appellant to think twice about appealing for fear of worse punishment. It is acknowledged and recognized that the Pearce case was premised on the hazard of indictiveness. This was recognized in *Moon vs. Maryland*, 398 U.S. 319, 90 Supreme Court 1730, 26 Lawyer Addition 2nd. 262, (1970); also see *Colten vs. Kentucky*, 407 U.S. 104, 92 Supreme Court (1953), 32 Lawyer Addition 2nd 484, (1972). The Colten case probably is the most applicable of those mentioned to the facts herein also, admittedly, none are entirely applicable. In Colten the Appellant process never did take place on the issue which brought about the greater sentencing after initial lighter sentence. Colton simply received a new trial at the Trial Court level, and received a harsher sentence the second time. The Colton case does stand for the principles that relief or pretended relief at the trial level does come under the Pearce dogma that post conviction relief should not bear the hazard of a vindictive result namely, that a person petitioning such relief should not have to fear that he will be given additional punishment for seeking further remedies of any kind after a conviction.

In the case of the Petitioner the Petitioner simply sought to rectify an illegal sentence. Instead of the

rectification which he sought he received a changed sentence which resulted in a harsher punishment. Sought results can only operate to the detriment of the constitutional provisions heretofore cited. Most certainly it is a denial of due process of law under the 5th. and 14th. Amendments to the Constitution of the United States if a person is placed in fear at any point where he is faced with the alternative of relying upon or abandoning those rights which those amendments provide or were intended to provide. Further it is submitted that it constitutes cruel and unusual punishment where the individual is given a greater sentence for no reason other than the fact that he complained of a lesser sentence. The case which best summarized the overall situation presented herein is that of *Chaffin vs. Stynchcombe*, 412 U.S. 17, 93 Supreme Court 1977, 36 Lawyer Addition 2d. 714. The granting of the petition herein would cause no confusion with state issues although, admittedly, state issues were the subject of the Petitioner's initial attempt to Appeal. Such state issues of course by the fullest measure of relief that could be granted by this Court would not be resolved and this is recognized. The fact remains that the Petitioner would have not further relief for the resolutions of such issues unless he can achieve a resolution by means of a Remand Ordered by this Court.

CONCLUSION

WHEREFORE, Petitioner prays that the Writ of this Court Issue to the Indiana Supreme Court all the pertinent papers in this cause and that there be a review of the proceedings therein, and in the lower Court of the State of Indiana, and that this decision of the Indiana Courts as it now stands be reversed with a Remand for proceedings to take place in the future in a manner consistent with an appropriate decision by this Court.

Respectfully submitted,

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APPENDIX "A"

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IN THE
COURT OF APPEALS OF INDIANA
FIRST DISTRICT

LESTER RYAN	)	
Defendant-Appellant,	)	
v.	)	No. 1-1273-A221
STATE OF INDIANA	)	
Plaintiff-Appellee.	)	

APPEAL FROM THE LAWRENCE CIRCUIT COURT
The Honorable H. Wayne Baker, Judge

PER CURIAM

Defendant-appellant Ryan raises but one issue on appeal. It concerns the legality of his sentence.

Ryan plead guilty to assault and battery. His sentence was for 180 days to be served from 8:00 A.M. each Sunday to 8:00 A.M. the following Tuesday until the time was completed. Ryan complained of the sentence in his motion to correct errors; accordingly, the trial judge modified the sentence making Ryan serve the period at one time.

There is no error for two reasons. First, the relief sought in the motion to correct errors was granted making the question moot. Second, the trial court may amend an erroneous sentence. *Jacobs v. State* (1972), _____ Ind.App. _____, 286 N.E.2d 224.

JUDGMENT AFFIRMED.

APPENDIX "B"

IN THE
INDIANA SUPREME COURT

(Appeal from the Circuit Court of Lawrence County, Indiana)
Cause No. 72-CR-76 Judge – Hon. H. Wayne Baker

LESTER RYAN	)	
Defendant-Appellant,	)	
vs	)	No. 1-1273A221
THE STATE OF INDIANA	)	
Plaintiff-Appellee	)	

PETITION TO TRANSFER FROM THE INDIANA COURT OF APPEALS TO THE INDIANA SUPREME COURT

Comes now Lester Ryan, Defendant-Appellant, in the above entitled cause, which was an appeal from the finding and judgment of the Lawrence Circuit Court in the cause entitled State of Indiana vs Lester Ryan being cause number 72-CR-76, which resulted in a judgment in favor of the State of Indiana and against Lester Ryan, and which resulted in an appeal being taken from the finding and judgment of the Lawrence Circuit Court to the Court of Appeals, being cause number 2-1273A221, and respectfully represents to this Honorable Court as follows:

I

(a) That the Court of Appeals decided the case with a written opinion on July 9, 1974;

(b) That the decision of the Court of Appeals was against Defendant-Appellant Lester Ryan, who is seeking the transfer from the Court of Appeals to this Honorable Court;

(c) That a Petition for Rehearing was timely filed with the Court of Appeals and that the Petition for Rehearing was denied by the Court of Appeals on August 12, 1974;

(d) That the decision and judgment of the Court of Appeals is in error in that the decision of the Court of Appeals contravenes a ruling precedent of the Supreme Court of Indiana with reference to ground b of the Petition for Rehearing which is as follows:

B

"This Honorable Court erred in holding and deciding that the trial court may ammend an erroneous sentence"

(e) The Court of Appeals erred in its final rhetorical paragraph of its opinion. "There resulted no error for two reasons. First, the relief sought in the Motion to Correct Errors is granted making the question moot. Second, the trial court may amend an erroneous sentence." *Jacobs v. State*, (1972), 286 N.E. 2d 224 Judgment affirmed.

II.

The errors upon which Appellant Ryan relies upon includes an analysis of typical cases set out in the Appellant's brief filed April 19, 1974 and which will be set out and commented upon in the brief in support of Petition for Rehearing which will be set out and commented upon in the Appellant's brief in support of this Petition to Transfer from the Indiana Court of Appeals to the Supreme Court of Indiana and which the Appellant relies upon to sustain his contention that the decision of the Court of Appeals controvenes rulings of the Supreme Court as herein above stated.

WHEREFORE, Lester Ryan, Defendant-Appellant herein, by counsel, respectfully prays this Honorable Court to grant this Petition to Transfer this appeal from the Court of Appeals to this Honorable Court, and that after said Petition for Transfer has been granted that this Honorable Court grant such further relief as is just and proper under the facts and law applicable to this case, and for all of the further, proper and complete relief in the premises.

Respectfully submitted,

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BRIEF OF RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

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BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

Indiana Court of Appeals, First District Cause No. 1-1273 A 221 (9 July, 1974) ___ Ind.___; 313 N.E.2d 351. Petition to Transfer to Indiana Supreme Court, Denied without opinion

31 October, 1974.

JURISDICTION

The State of Indiana questions the right of Petitioner to appeal this action as the validity of a state statute is not involved and no federal question of substance was presented to or determined by the State of Indiana.

QUESTION PRESENTED

Whether a trial court can properly modify its own sentence to bring it within the provisions of the law. In the state courts the Appellant-Petitioner stated the issue for review.

"There is one (1) issue for review by this Court concerning the validity of the conviction and sentencing of Appellant Lester Ryan,

as presented by the record of the proceedings:

1. The Court below erred in imposing an illegal executed sentence because the term of service and imprisonment, by the Court's records, should have commenced in the future, which is contrary to law, because the term of service and imprisonment shall commence from the day of conviction and sentence."

Statutes Involved.

IC 35-1-54-4 Assault and Battery;
IC 35-4.1-4-17 Correction of Erroneous Sentence.

STATEMENT

Lester Ryan was involved in a domestic quarrel and shot his son in law's father. He was charged with assault and battery with intent to kill. He entered a plea of guilty to the lesser included offense of assault and battery. On February 2, 197[illegible],

he was sentenced as follows:

> The court now hears sworn statements of the defendant and others in open court and the court having seen and examined the pre-commitment investigation and being duly advised in the premises, does now on the plea of guilty of the defendant to the included charge of assault and battery, now finds the defendant guilty of assault and battery. It is, therefore, considered, ordered and adjudged that the defendant for the crime by him committed be fined in the sum of $500.00 and costs of this action and sentenced to the Lawrence County jail for a term of six months, which term shall be served as follows: two days each weekend between the hours of 8:00 A.M. on Sunday to the hour of 8:00 P.M. on the following Tuesday until said 180 days be served. Upon the payment of fine and upon completion of service of such sentence, clerk is ordered to release defendant's bond of record. (Tr.p. 60).

On February 16, 1973, Ryan filed a Motion to Stay Execution of the Sentence.

The motion was sustained.

On October 5, 1973, the Court corrected the judgment and sentence rendered, by striking therefrom the underlined portion. The Court went on to hold:

> It is now ordered and adjudged by the court that said defendant be committed to the Lawrence County jail for a term of six months and that he be allowed credit of 14 days thereon from date of judgment February 2, 1973, until February 16, 1973, at which time execution of the judgment was stayed by this court. (Tr. p. 38).

ARGUMENT

Under rules of the Supreme Court of the United States; Rule 23(1)(f) provides:

> (f) If review of the judgment of a state court is sought, the statement of the case shall also

specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised, the method of raising them (e.g. by a pleading, by request to charge and exceptions, by assignment of error), and the way in which they were passed upon by the court, such pertinent quotations of specific portions of the record or summary thereto, with specific reference to the places in the record where the matter appears (e.g., ruling on exception portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

The Petitioner now raises a question not presented to the trial court, the Indiana Court of Appeals, or the Indiana Supreme Court. That question is "Whether or not it constitutes a denial of due process to increase a prison term already imposed

when the accused undertakes the first step of an appeal."

Petitioner alleges that the trial court imposed a harsher sentence by sustaining his Motion to Correct Errors. The argument presented by the Petitioner is without substance.

The petitioner was sentenced to serve one hundred eighty (180) days; to be served on weekends. The statute provided for a penalty of one hundred and eighty days IC 35-1-54-1. Petitioner filed a Motion to Correct Errors alleging that the sentence was illegal in that it was to begin at a future time. In response to the motion the trial court changed the

the sentence (IC 35-4.1-17) to 180 days giving defendant credit on his sentence for the fourteen days between original sentence and stay of execution.

The State is unable to understand Petitioner's mathematical formula under which he alleges that 180 days is a harsher sentence than 180 days (i.e. 60 x 3 day periods).

Each sentence being for 180 days no harsher sentence was imposed by the modification and in fact Petitioner received credit for fourteen days which he did not serve.

The validity of a state statute is not involved here and there is no federal question of substance pre-

sented by the petitioner.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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